

1 Respondent agency was represented by Keith D. McGoffin, attorney
2 at law. Appellant Savage Enterprises, Inc. was represented by
3 Anne-Marie Weller, attorney at law.

4 Witnesses were sworn and testified. Exhibits were admitted and
5 examined. Argument was heard. From the testimony, evidence, and
6 contentions of the parties the Board makes these

7 FINDINGS OF FACT

8 I.

9 The Puget Sound Air Pollution Control Agency (PSAPCA) is an
10 activated air pollution control authority under the terms of the
11 state's Clean Air Act, empowered to monitor and enforce emission
12 standards for hazardous air pollutants, including work practices for
13 asbestos.

14 PSAPCA has filed with the Board certified copies of its
15 Regulations 1 and 2, of which we take official notice.

16 II.

17 Savage Enterprises, Inc. is a contractor located in Seattle, which
18 specializes in asbestos removal having to do with demolition or
19 remodeling of commercial buildings. The company has previously been
20 involved in hundreds of asbestos removal projects. This particular
21 case involves the remodeling of offices on the mezzanine of the main
22 terminal at Seattle-Tacoma International Airport.

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1 III.

2 On Tuesday, February 11, 1986, at approximately 8:45 a.m. a PSAPCA
3 inspector, and a Labor and Industries inspector, in response to a
4 complaint, conducted an inspection of asbestos removal operations at
5 Sea-Tac. The material being removed was a hard cementitious monocote
6 type material which had originally been sprayed on steel beams above
7 the ceiling level as a fire proofing measure. This material is only
8 marginally friable. It is difficult to keep wet because it does not
9 absorb water.

10 There were seven of appellant's employees working on the project
11 at the time of the inspection. All wore protective clothing and
12 respirators. Moreover, the work area was enclosed with polyethylene
13 sheeting and high efficiency particulate air (HEPA) filters were used
14 during removal operations. The area was maintained as a negative air
15 enclosure. Access was through a three chamber air lock. A shower and
16 changing area was included within the ingress/egress system.

17 The inspectors observed monocote material being removed without
18 being wetted during removal. The inspectors also observed dry debris
19 heaped up in the middle of the floor and other pieces of dry debris
20 scattered on the floor throughout the work area. They collected
21 samples of the debris for analysis and discussed asbestos removal
22 regulations with a representative of Savage. They advised that
23 asbestos debris must be wetted during removal and kept wet while it
24 awaits bagging in leak-tight containers.

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Upon exiting, the inspectors observed debris on the floor of the decontamination area and noted that it was being tracked out into the hallway where other workers, not involved in asbestos removal, were free to go.

IV.

On the morning of Friday, February 14, 1986, PSAPCA's inspector returned alone to the project site at Sea-Tac and observed a number of debris-filled bags that had already been sealed. She also observed a stack of coated steel mesh and beam covers piled in the middle of the floor. The inspector noted that this debris was not wet and was not contained in leak-tight containers. She estimated that this material had accumulated over a three week period. She collected samples of the debris for analysis.

The inspector contacted Savage's foreman and informed him that asbestos debris must be placed in leak-tight containers, sealed while the material is wet at the end of each day. The inspector drew attention to the debris piled in the middle of the floor. The foreman then directed that water be sprayed on the pile.

V.

On February 12, 1986, PSAPCA issued two notices of violation to Savage Enterprises arising from the inspections of February 11 and 14, 1986. The notices alleged violations of WAC 173-400-075 (Emission Standards for Sources Emitting Hazardous Air Pollutants) and Article 10, Sections 10.04 and 10.05, of PSAPCA's Regulation I (Removal and

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1 Encapsulation of Asbestos Material).

2 VI.

3 On March 18, 1986, a University of Washington laboratory forwarded
4 its report of the analysis of the samples collected by the PSAPCA
5 inspector on February 11, and 14, 1986. The report showed that all
6 the samples contained substantially in excess of 1% of chrysotile
7 asbestos.

8 VII.

9 On May 20, 1986, PSAPCA mailed Notice and Order of Civil Penalty
10 Nos. 6439 and 6440 for \$1000 each to Savage Enterprises, alleging
11 violations of the regulatory provisions identified in the earlier
12 notices of violation. These penalty notices were received May 30,
13 1986. Feeling aggrieved by these penalties, appellant filed an appeal
14 with this Board which we received on June 19, 1986.

15 VIII.

16 At hearing, Savage's vice president, veteran of over 400 asbestos
17 removal projects, testified to the difficulty of wet removal for the
18 cementitious material involved in the Sea-Tac project. He advised
19 that large amounts of water were sprayed on the material in advance,
20 but because of the non-absorbant quality of the monocote, the material
21 on the beams did not stay wet.

22 He stated, in addition, that the work space inspected was an
23 office area which had never been finished in the first place and that
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1 piles of material were lying on the floor when Savage's workmen went
2 in to remove asbestos.

3 He acknowledged that some fiber releases were possible during
4 removal and handling of cementitious asbestos, but felt that the risk
5 was much less than with readily friable materials.

6 IX.

7 Before the inspections at issue, Savage attempted informally to
8 secure approval from PSAPCA for wet stockpiling of a portion of the
9 removed material, covered with Visqueen on the floor within the
10 negative air enclosure, prior to transportation to a disposal site.
11 No approval of this or any other non-standard procedure was received.

12 By its own admission, Savage waited until February 14, 1986, to
13 dispose of certain bags of debris which were collected and set aside
14 on February 7, 1986. The seven day period included an intervening
15 weekend.

16 X.

17 During the course of the asbestos removal project at Sea-Tac,
18 Savage caused ongoing analysis to be made of air samples taken both
19 inside and immediately outside the work area. These counts showed
20 airborne fiber concentrations below the levels established by
21 occupational health authorities for permissible exposure to asbestos
22 fibers. Samples taken on February 11, 1986 showed such conditions.
23 No sampling was done on February 14, 1986.

1 XI.

2 Asbestos is a pollutant classified federally as a "hazardous air
3 pollutant." Under Section 112 of the Federal Clean Air Act this term
4 describes a substance which

5 causes, or contributes to, air pollution which may
6 reasonably be anticipated to result in an increase in
7 mortality or an increase in serious irreversible, or
8 incapacitating reversible, illness.

9 Asbestos is subject to a special set of work practices adopted under
10 the rubric of National Emission Standards for Hazardous Air Pollutants.

11 XII.

12 Any Conclusion of Law hereinafter determined to be a Finding of
13 Fact is hereby adopted as such.

14 From these Facts, The Board comes to these

15 CONCLUSIONS OF LAW

16 I.

17 The Board has jurisdiction over these persons and these matters
18 Chapters 70.94 and 43.21B RCW.

19 II.

20 The state adopted WAC 173-400-075(1) which provides:

21 The emission standards for asbestos, benzene from
22 fugitive emission sources, beryllium, beryllium rocket
23 motor firing, mercury and vinyl chloride promulgated by
24 the United States Environmental Protection Agency prior
25 to October 1, 1984, as contained in 40 CFR Part 61, are
26 by this reference adopted and incorporated herein.

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1 From context it appears that the state regulation is designed to
2 incorporate the work practices mandated federally for handling these
3 substances.

4 III.

5 On each Notice and Order of Civil Penalty here, PSAPCA asserted a
6 violation of WAC 173-400-075. However, neither notice cites any
7 specifics of the federal regulations incorporated by reference
8 therein. RCW 70.94.431 requires that violations be described "with
9 reasonable particularity." Because this was not done, we must reverse
10 as to purported violations of the state regulation.

11 IV.

12 PSAPCA has adopted its own regulations on removal of asbestos
13 which are closely patterned on the federal regulations incorporated in
14 WAC 173-400-075. These are set forth in Article 10, of PSAPCA
15 Regulation I.

16 V.

17 Savage's presentation suggested that the cementitious material
18 encountered here is not an appropriate subject for the PSAPCA's wet
19 removal and handling requirements because it does not meet the
20 technical definition of "friable asbestos." Under the federal
21 regulations at 40 CFR 61. 141, "friable asbestos material" means:

22
23 any material containing, more than 1 percent asbestos by
24 weight that hand pressure can crumble, pulverize or
25 reduce to dust.

1 PSAPCA's regulations, however, deal slightly differently with what
2 is subject to regulation. Article 10 relates to "asbestos material",
3 which under Section 10.02(e) means:

4 Any material containing at least one (1%) asbestos by
5 weight, unless it can be demonstrated that the material
6 does not release asbestos fibers when crumbled,
pulverized or otherwise disturbed.

7 Through this definition, PSAPCA requires that once the threshold
8 asbestos content is demonstrated, the person resisting regulation must
9 show that fibers would not be released during removal. While similar
10 to the concept of "friable asbestos" we believe the PSAPCA definition
11 establishes a more exacting standard.

12 Savage failed to prove that the monocote material at hand was not
13 "asbestos material." Therefore, we hold that Article 10 applies to
14 this case.

15 VI

16 Regulation I, Section 10.04(b), dealing with the removal process .
17 reads, in pertinent part:

18 (b) It shall be unlawful to cause or allow the removal or
19 encapsulation of asbestos material unless: ...

20 (2) The following procedures are employed: ...

21 (11) Asbestos materials shall be adequately
22 wetted when they are being stripped from facility
23 components.

24 (111) Asbestos materials that have been removed
25 or stripped shall be:

26 (A) Adequately wetted to ensure that they
27 remain wet until they are collected for
disposal.

1 "Collected for disposal" is a defined term which means "sealed in
2 a leak-tight, labeled container while wet." Section 10.02(h).

3 Notice of Civil Penalty 6439 asserts violation of the above
4 provisions of Section 10.04 on August 11, 1986. It is clear that all
5 the asbestos material was not wet when stripped, nor kept wet until
6 bagged. We conclude that, under the facts, these quoted requirements
7 were violated on the date in question.

8 VII.

9 Regulation I, Section 10.05(b), dealing with the disposal process,
10 reads, in pertinent part:

11
12 (b) One of the following disposal methods shall be used
13 during the collection, processing, packaging,
14 transporting or depositon of any asbestos-containing
15 waste material;

16 (1) Treat all asbestos containing waste material
17 with water as follows...

18 (iv) After wetting, seal all asbestos-containing
19 waste material in leak-tight containers while wet.

20 Notice of Civil Penalty 6439 asserts violation of the quoted
21 provisions of Section 10.05 on August 11, 1986. Section
22 10.04(b)(2)(iii)(B), in effect, requires that materials be bagged only
23 at the end of each working day. The inspection on the 11th, however,
24 occurred in the morning. The occasion for bagging debris on that day
25 had not yet arisen. The inspectors did not observe the actual bagging
26 operations of debris generated on the 11th, whenever it occurred.

1 PSAPCA's inspector apparently assumed that some of the debris
2 observed on the 11th had been stripped by Savage earlier and allowed
3 to accumulate dry on the floor over a period of days. This, however,
4 was not proven.

5 Therefore, we conclude that no violation of Section
6 10.05(b)(1)(iv) on August 11, 1986, was shown.

7 VIII.

8 Regulation I, Section 10.05 (c), reads:

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10 Unless the asbestos - containing waste material is
11 handled as dangerous waste in accordance with WAC
12 173-303, it shall be deposited within five days after
collection for disposal at a waste disposal site operated
in accordance with the provisions of 40 CFR 61.156 and
approved by the health department with jurisdiction.

13
14 Notice of Civil Penalty 6440 asserts the violation of the above
15 provision on February 14, 1987, as well as of the requirement for
16 bagging and sealing wetted debris (Section 10.05(b)(1)(iv)). Again,
17 there is no evidence of observation of the actual bagging process.
18 Moreover, we were not persuaded that the inspector's estimate that
19 unbagged material had piled up for three weeks was other than mere
20 speculation.

21 However, as to the bagged material, the record discloses an
22 admission by Savage of retention on site for more than five days.
23 Savage argues that the regulation should be interpreted to mean five
24 "working days," but we have discovered nothing in Article 10 to

1 support such an interpretation and decline to adopt it. We conclude
2 that there was a violation of the five day rule of Section 10.05(c) on
3 February 14, 1986.

4 IX.

5 In sum, we sustain one of the two violations asserted under each
6 of the civil penalty notices. The remaining question then is whether
7 the \$1000 penalty assessed under each notice is appropriate.

8 X.

9 In reviewing the amount of civil penalties, we have treated the
10 question as a matter involving consideration of factors bearing on
11 reasonableness. We have attempted to view reasonableness in light of
12 the primary aim of the civil penalty, which is not to exact
13 retribution but to influence the behavior of the perpetrator and to
14 deter violations generally.

15 In the instant case, the air monitoring data indicates no
16 appreciable contamination of the air either within or without the work
17 enclosure. The tracking of debris out of the enclosure shows sloppy
18 control of work procedures. But no dust emissions were shown to have
19 been the result. The object of PSAPCA's asbestos regulations is to
20 prevent air pollution, which by statutory definition is actual or
21 likely contamination of the outdoor atmosphere. RCW 70.94.030(2). No
22 actual impacts on the outside air occurred here.

23 Thus, evaluation of the seriousness of the offenses turns on a
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1 consideration of the risks created. Here the factors are to some
2 degree offsetting. On the one hand, asbestos is an extraordinarily
3 dangerous material. Because of this we have tended to affirm
4 significant penalties for violation of procedures designed to protect
5 against the hazard. See, e.g., AK-WA, Inc. v. PSAPCA, PCHB 86-111
6 (February 13, 1987). On the other hand, the risks here were
7 substantially reduced, if not eliminated, by the use of the negative
8 air enclosure which provided additional containment over and above the
9 wetting down of debris and the use of leak-tight bags.

10 The violations affirmed relate solely to conditions within the
11 effectively-sealed off enclosure before the debris in question was
12 taken out for disposal. The risks that we deal with under the State
13 Clean Air Act are to persons outside this environment. Because of the
14 protective redundancy in the procedure followed, we do not believe
15 this case presents a picture of major air pollution risk (as opposed
16 to occupational health and safety danger).

17 We do, however, believe that repetition of the violations
18 committed should be discouraged and that a penalty is necessary in the
19 further interests of deterrence of the general community.

20 Accordingly, we conclude that the Order set forth below is
21 appropriate.

ORDER

Notice and Order of Civil Penalty No. 6439 is affirmed as to a violation of Section 10.04(b)(2)(ii) and (iii)A. Notice and Order of Civil Penalty No. 6440 is affirmed as to a violation of Section 10.05(c). In all other respects these notices are reversed. The penalty in each notice is abated to \$250, meaning that a penalty that an aggregate fine of \$500 shall be due and owing upon entry of this Order.

DONE this 17th day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Member

Lawrence J. Faulk 4/17/87
LAWRENCE J. FAULK, Chairman

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